(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: AUG 15 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

cc: [redacted]

DISCUSSION: The Director, Nebraska Service Center, revoked the approval of the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. §§ 103.3(a)(2)(v)(A)(*1*) and (B)(*1*).

The petitioner describes itself as an information technology services business. It seeks to permanently employ the beneficiary in the United States as an IT manager. The petitioner requests classification of the beneficiary as a member of the professions holding an advanced degree pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanies the petition.

In a Notice of Intent to Revoke (NOIR), the director notified the petitioner that the position offered was not a *bona fide* job offer based on the petitioner's owners' convictions on charges related to an H-1B nonimmigrant visa case. The director subsequently revoked the approval of the petition noting that as the convicted owners were in control of the petitioner's business operations, all of the petitioner's business operations were fraudulent and the offer of employment in the present case was, therefore, not *bona fide*. The director further indicated that the revocation of the petition's approval was also supported by the numerous inconsistencies in the beneficiary's employment history and the suspect signature of the petitioner's human resources director on the ETA Form 9089.

The record of proceeding contains a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, for the beneficiary's representative. Additionally, the Form I-290B, Notice of Appeal or Motion, was signed by the beneficiary's representative. The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically prohibits a beneficiary of a visa petition or a representative acting on a beneficiary's behalf, from filing an appeal. There is no evidence in the record that the petitioner consented to the filing of the appeal.[1]

On appeal, counsel for the beneficiary contends that the beneficiary should be given standing in this matter as he has "ported" to other employment pursuant to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) and would be placed in an impossible position if he had to rely on his former employer to defend the instant petition. Counsel also asserts that the issue of standing has been waived by the decision of U.S. Citizenship and Immigration Services (USCIS) to discuss the issues raised in the beneficiary's response to the NOIR. He further contends that the AAO should consider the appeal "because of the public interest of ensuring that it complies with the law."

Although counsel offers various rationales for consideration of the appeal, the AAO notes that the regulation at 8 C.F.R. § 103.3(a)(iii)(B) limits the filing of an appeal to an "affected party," which it defines as "the person or entity with legal standing in a proceeding," specifically excluding the beneficiary of a visa petition from that definition. Accordingly, the AAO may not consider an appeal

[1] The AAO will, nevertheless, provide the beneficiary's counsel with a copy of this decision as a matter of courtesy.

filed by a beneficiary and the instant appeal of the director's revocation of the approval of the Form I-140 petition is therefore rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*). [2]

However, while it has rejected the appeal because the appellant lacks legal standing, the AAO will, nevertheless, discuss the director's decision.

The AAO concurs with the director's conclusion that numerous inconsistencies in the beneficiary's employment history, as established by the record, support the revocation of the instant Form I-140's approval. As discussed below, it finds that these inconsistencies, by themselves, would have required the director to revoke the approval of the petition as the evidence of record at the time the NOIR was issued, if unexplained and unrebutted, would have warranted the revocation of the approval of the visa petition.

Beneficiary's Employment History

Vision Systems Group, Inc. filed the Form I-140 petition seeking classification of the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability not seeking a national interest waiver pursuant to section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2).

To establish that a beneficiary is qualified for the offered position, a petitioner is required to demonstrate that a beneficiary meets all of the requirements of the offered position set forth on the labor certification by the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The priority date of the petition is September 2, 2005, the date the petitioner filed the labor certification application with DOL.

In the instant case, the ETA Form 9089 filed with DOL states the following minimum requirements for the offered position:

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[2] The AAO notes that counsel's signatures on the Form I-290B and the Form G-28 are the product of a signature stamp, rather than original signatures. Pursuant to the regulation at 8 C.F.R. § 103.2(a)(2), "an acceptable signature on [a] benefit request that is being filed with the USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format." General Instructions for the Form G-28, Part 1. Information About Attorney or Accredited Representative state "Signature stamps are not permitted." Accordingly, even if the beneficiary were eligible to file the appeal, the Form I-290B and the Form G-28 are not properly executed and the appeal may be rejected by the AAO. AAO also notes that although the regulations, 8 C.F.R. § 205.2(d), provide 15 days (18 days if unfavorable decision was mailed under 8 C.F.R. § 103.8(b)) to appeal a revocation decision, the director informed the petitioner that it had 30 days (33 days if mailed) to appeal the revocation.

H.4.	Education: Master's.
H.4-B.	Major field of study: Computer Science.
H.5.	Training: None required.
H.6.	Experience in the job offered: 12 months.
H.7.	Alternate field of study: Accepted.
H.7-A.	Major alternate field of study: Engineering, mathematics, science.
H.8.	Alternate combination of education and experience: Accepted.
H.8-A.	Alternate level of education: Bachelor's.
H.8-C.	Number of years alternate experience: Five (5).
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: Accepted.
H.10-B.	Alternate occupation: Senior Software Engineer.
H.14.	Specific skills or other requirements: None.

Therefore, the minimum requirements for the proffered position are a master's degree in computer science or engineering, mathematics, or science and 12 months of experience in the proffered position or as a senior software engineer. As an alternative to the master's degree requirement, an applicant could qualify through a bachelor's degree plus five years of experience.

The labor certification indicates that the beneficiary holds a Bachelor of Engineering degree from It further reflects that, as of the September 2, 2005 priority date, the beneficiary had worked for the following companies as an IT Manager: the petitioner, beginning April 2003; an information technology service business in Plainville, Connecticut from September 6, 2000 to March 31, 2003; and another information technology service business, in Dublin, Ohio from October 17, 1998 to August 6, 2000. The labor certification also states that the beneficiary was employed as a from July 7, 1998 to October 13, 1998 and with from February 24, 1997 to July 6, 1998. The beneficiary signed the labor certification declaring that the contents were true and correct under penalty of perjury.

However, as previously indicated, the record contains evidence that conflicts with this employment history, casting doubt on the beneficiary's claimed employment experience and preventing the petitioner from establishing that the beneficiary's experience, when combined with his bachelor's degree, qualifies him to perform the duties of the offered position.

Employment with

In addition to the instant petition with an accompanying labor certification (2005 ETA Form 9089), the record contains two other labor certifications filed on behalf of the beneficiary by two additional employers, one in 2004 (2004 Form ETA 750) and the other in 2012 (2012 ETA Form 9089) for a total of three labor certification applications contain in the record of proceeding. Those separate filings indicate inconsistent representations about the beneficiary's employment experience with the petitioner. Although the 2012 ETA Form 9089 indicates that the beneficiary was employed by the

petitioner as an IT Manager, the 2004 Form ETA 750 reflects that his employment with the petitioner was as a programmer analyst. The record for the instant petition and accompanying labor certification also contains an April 30, 2007 letter from the written on letterhead, which states that the beneficiary has been employed with the company as a programmer analyst since April 2003. Four Labor Condition Applications (LCAs) filed by the petitioner on behalf of the beneficiary during the period 2003 through 2006 also reflect that the petitioner was employing the beneficiary during these years as a programmer analyst, not an IT Manager.[3] Further, the record contains an August 15, 2006 letter to USCIS from the in which he states that the beneficiary, at that time, was employed as a programmer analyst.

These inconsistencies cast doubt on the beneficiary's claimed employment experience. Doubt cast on any aspect of the proof submitted by a petitioner may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Employment with

As indicated above, the instant 2005 ETA Form 9089 reports that the beneficiary was employed as an from September 2000 to March 2003. In support of this claim, the record contains an April 23, 2003 statement signed by a who states that the beneficiary was employed by his firm as an IT Manager from September 2000 to March 2003. However, the record also contains two other statements relating to the beneficiary's employment with that are also signed by this same Senior Associate, but which contradict his April 23, 2003 assertion that the beneficiary was employed by In one, also dated April 23, 2003 and submitted with the 2004 Form ETA 750, the writer reports that the beneficiary worked as a programmer analyst from June 2000 to March 2003. In the other, dated February 4, 2003 and submitted with the 2012 ETA Form 9089, the writer states that the beneficiary has been employed by since May 2000.

The AAO also notes that the 2004 Form ETA 750 filed with DOL states that the beneficiary's employment with was as a programmer analyst, as does the 2012 ETA Form 9089. Two Forms G-325A, Biographic Informations, signed by the beneficiary on June 27, 2007 and November 7, 2009, and the copy of the beneficiary's resume found in the record also indicate that employed him as a programmer analyst, not as an IT Manager. Further, the previously noted 2006 letter from the Senior Vice President of also reflects that the beneficiary's employment with was as a programmer analyst. These inconsistent claims cast doubt on the beneficiary's claimed employment experience. *Id.*

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[3] The AAO also notes that on the LCA approved by DOL on August 26, 2005, the petitioner indicates its address as while on the ETA Form 9089 it filed on September 2, 2005, the petitioner stated its address as The record does not explain this inconsistency.

Employment with

With regard to the beneficiary's employment as an IT Manager with the record contains a December 22, 2000 statement from the company's president, in which he indicates that the beneficiary worked as an IT Manager from October 1998 through August 2000. However, a second statement from this same individual, also dated December 22, 2000 and submitted with the 2004 Form ETA 750, reflects that the beneficiary worked as a programmer analyst from October 1998 to June 2000.[4] The 2004 Form ETA 750 also states the beneficiary's employment with Inc. was as a programmer analyst, as does the August 15, 2006 letter to USCIS from the Senior Vice President of The AAO further notes that the beneficiary's resume also reflects that his employment with InfoVision 21, Inc. was as a programmer analyst.

The numerous inconsistencies relating to the beneficiary's prior employment undermine the qualifying experience represented on the instant ETA Form 9089. Accordingly, the AAO does not find the record to establish a reliable employment history for the beneficiary or that he is qualified to perform the duties of the offered position, thereby precluding the approval of the Form I-140 even if the appeal were properly filed. The record lacks any competent, objective evidence reconciling these inconsistencies. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho* at 591-92.

Human Resources Signature

The director also indicated in his decision that the signature of the petitioner's human resources director on the instant ETA Form 9089 differs significantly from this individual's signature on other documents found in the record. The AAO agrees that the signature of the petitioner's human resources director on the labor certification is inconsistent with her signature elsewhere in the record.

Misrepresentation of a Material Fact by Beneficiary

Moreover, it is noted that the beneficiary signed the ETA Form 9089, declaring its contents to be true and correct, when the employment it described with and did not reflect the experience indicated on his own resume. As a result, it appears that the beneficiary may have willfully misrepresented a material fact in these proceedings, which would render him inadmissible to the United States pursuant to section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), which states "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

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[4] It is noted that although both of these December 22, 2000 statements are written on Inc. letterhead, the letterheads are not the same, casting doubt upon their authenticity. *Matter of Ho.*

A willful misrepresentation of a material fact is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). As a material issue in this case would be whether the beneficiary was qualified to perform the duties of the proffered position through meeting the experience requirements of the position offered, the beneficiary's claim on the ETA Form 9089 of having worked as an IT Manager for the petitioner, and would constitute an act of willful misrepresentation if the beneficiary was not employed in this position. The listing of such experience would misrepresent the beneficiary's actual qualifications in a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Here, the listing of false experience would be a willful misrepresentation of the beneficiary's qualifications, which adversely impacted DOL's adjudication of the ETA Form 9089 and USCIS's immigrant petition analysis. However, the AAO does not reach any determination on the merits of the matter, as the instant appeal is not within the AAO's jurisdiction at this time.

Petitioner's Plea Agreement

The AAO also notes that the director's decision was based in part on overreaching assumptions not specifically tailored to the individual facts of this case. The record reflects that, on April 29, 2011, in the U.S. District Court for the Southern District of Iowa, the petitioner pled guilty to one count of mail fraud, 18 U.S.C. § 1341 and each of its owners to one count of unlawfully hiring aliens, 8 U.S.C. § 1324(3)(A). Included in the record is the plea agreement relating to the petitioner's violation of 18 U.S.C. § 341, which outlines the facts to which it admitted to pleading guilty to mail fraud. The plea agreement indicates that on or about August 13, 2007, the petitioner submitted to USCIS a Form I-129, Petition for Nonimmigrant Worker, which misrepresented the name of the beneficiary's prospective employer, the location of the beneficiary's employment and the number of employees working for the beneficiary's prospective employer, as it had no actual employees. These misrepresentations, the plea agreement states, were made by the petitioner in order to obtain lawful temporary residency for the beneficiary.

While the AAO notes the facts admitted by the petitioner in the above case, the petitioner's conviction for mail fraud in the above case does not automatically render all of its business operations fraudulent or allow USCIS to conclude that no offer of employment made by the petitioner is *bona fide*. Such extrapolation by the director was unwarranted without further identification of how the individual facts of this case also led to the conclusion that fraud occurred and there is no bona fide job offer, and to the extent that it formed the basis for his decision, the AAO finds the decision to be in error.

In the present case, the beneficiary has appealed the director's revocation of the approval of the immigrant visa petition. As the beneficiary has no legal standing in this matter, the appeal will be rejected as improperly filed pursuant to the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is rejected.